

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

199

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,768

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED DEC 10 1958

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J. L. HOFFLUND,

Joseph W. Stewart
CLERK

Appellant,

v.

THE SECRETARY OF THE INTERIOR,
Fred A. Seaton; and the
CHAIRMAN AND MEMBERS OF THE
UNITED STATES CIVIL SERVICE COMMISSION,
Philip Young, George M. Moore,
and Frederick J. Lawton,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J. L. HOFFLUND

3041 Dogwood Street, N. W.
Washington 15, D. C.

Pro Se

STATEMENT OF QUESTIONS PRESENTED

1. The question is whether the judgment for Appellant (Plaintiff below), a veteran and "preference eligible" within the meaning of the Veterans Preference Act,¹ should declare his demotion to be unlawful and should set it aside, in view of the finding that his demotion was invalid and in violation of his rights under section 12 of that Act² and the regulations of the Civil Service Commission.³

2. The question is whether the judgment for Appellant (Plaintiff below), which requires only ". . . that Defendants take appropriate action, consistent with this judgment . . .," without specifying the action to be taken, is illusory, devoid of force, and fails to afford Appellant the relief to which he is entitled.

3. The question is whether the District Court had jurisdiction to adjudicate Appellant's (Plaintiff below) third count, a cause of action for declaratory and mandatory relief on account of Appellant's reduction in pay in violation of his rights under the Salary Retention Act.⁴

¹ Act of June 27, 1944, 58 Stat. 387, as amended; 5 U. S. C. 851-869.

² 5 U. S. C. 861.

³ 5 C. F. R. 1958 Supp., secs. 20.1-20.8.

⁴ Act of June 18, 1956, 70 Stat. 291; 5 U. S. C. Supp. V, sec. 1107.

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UNITED STATES COURT OF APPEALS
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J. L. HOFFLUND,

Appellant,

v.

THE SECRETARY OF THE INTERIOR,
Fred A. Seaton; and the
CHAIRMAN AND MEMBERS OF THE
UNITED STATES CIVIL SERVICE COMMISSION,
Philip Young, George M. Moore,
and Frederick J. Lawton,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The lower tribunal had and this court has jurisdiction upon the following basis:

1. Section 10 of the Administrative Procedure Act of June 11, 1946 (60 Stat. 243; 5 U.S.C. 1009) gives to the District Courts jurisdiction to

review agency action, and to ". . . set aside agency action . . . found to be . . . without observance of procedure required by law . . ." (complaint, par. 2, J.A. 2).

2. The Declaratory Judgments Act of June 25, 1948 (62 Stat. 964; 28 U.S.C. 2201-2) gives to the District Courts jurisdiction to ". . . declare the rights and legal relations . . ." of parties to actual controversies. (complaint, par. 2, J.A. 2).

3. Rule 65 of the Rules of Civil Procedure for the United States District Courts recognizes the jurisdiction of those courts to issue a mandatory injunction.

4. Sec. 1 of the Act of June 25, 1948; (62 Stat. 929; 28 U.S.C. 1291) gives to the United States Courts of Appeal jurisdiction of appeals from the judgments of District Courts.

5. This Court of Appeals, in a recent action for declaratory judgment and injunctive relief, held that: "Our own numerous decisions following challenges to the loyalty and other employee removal procedures permit no doubt as to the jurisdiction of the district courts to hear cases such as this." Jason v. Summerfield, 1954; 94 U.S. App. D.C. 197, 214 F. 2d 273; cert. denied 75 S. Ct. 48, 348 U. S. 840, 99 L. Ed. 662.

STATEMENT OF THE CASE

This is an action by the Appellant (Plaintiff below), an employee of the Federal Government, for relief from a demotion in grade and reduction in pay in violation of certain statutory rights and the regulations of the Civil Service Commission. Trial was by the Court without a jury.

The complaint is in three counts. The first count (J.A. 2) is for failure of the Appellees (Defendants below) to apply the retention preference procedures to Appellant's demotion, as required by section 12

of Veterans Preference Act⁵ and the regulations of the Civil Service Commission.⁶

The second count (J.A. 4) is for failure of the Appellees (Defendants below) to give to Appellant (Plaintiff below) the notice required by Section 14 of the Veterans Preference Act⁷ as an incident to his demotion.

The third count (J.A. 4) is for failure of the Appellees (Defendants below) to maintain Appellant's (Plaintiff below) salary at the same rate notwithstanding his demotion in grade, pursuant to the Salary Retention Act.⁸

The facts were not in dispute below, being established by the pleadings, the pre-trial order, and documents received in evidence without objection. No testimony was taken.

With respect to Appellant's first count (failure to apply the retention preference procedures), the trial court found that Appellant had been demoted without any reference to or application of the retention preference procedures as required by section 12 of the Veterans Preference Act (supra) and the regulations of the Civil Service Commission (supra), and was therefore "invalid" (J.A. 8-17). Thereupon, the trial court rendered its judgment for Appellant (Plaintiff below) on the first count ". . . that Defendants take appropriate administrative action, consistent with this judgment" (J.A. 16). The judgment does not define "appropriate administrative action" or otherwise specify what action the Defendants shall take, nor does it declare Appellant's (Plaintiff below) rights.

The trial court adjudicated only the first count, holding that in view of its decision on this count it was unnecessary to adjudicate the

⁵ Act of June 27, 1944, 58 Stat. 387, as amended; 5 U. S. C. 861.

⁶ 5 C. F. R. 1958 supp., secs. 20, 1-20.8.

⁷ Act of June 27, 1944, 58 Stat. 387, as amended; 5 U. S. C. 863.

⁸ Act of June 18, 1956, 70 Stat. 291; 5 U. S. C. supp. V, 1107.

second count, and that it had no jurisdiction to adjudicate the third count (J.A. 11).

The issues on this appeal are: (1) the propriety and sufficiency of the judgment for Appellant (Plaintiff below) on his first count, in view of the findings and conclusions; and (2) the propriety of dismissing the third count for lack of jurisdiction.

STATUTES AND REGULATIONS INVOLVED

Note. The first count of the action below is based on the demotion of Appellant (Plaintiff below) in violation of section 12 of the Veterans Preference Act and the Retention Preference Regulations of the Civil Service Commission, but neither the act nor the regulations are involved in this appeal, because the objection is not to the findings of the trial court relating thereto, but to its judgment rendered on those findings. Likewise, the third count is based on failure of Appellees (Defendants below) to maintain Appellant's salary notwithstanding his demotion, pursuant to the Salary Retention Act, but that act is not involved in this appeal, because the objection is not to any adjudication of this count, but to the refusal of the trial court to adjudicate it for lack of jurisdiction. The statutes directly involved in this appeal are those which prescribe the relief to be granted upon such findings as the trial court made and those under which the trial court had jurisdiction over the third count. The relevant parts of those statutes are set forth here pursuant to rule 17(b) (6) of this Court. The provisions of the other statutes and regulations not directly involved, above referred to, are sufficiently set out in the argument.

1. Sec. 10(e) of the Administrative Procedure Act of June 11, 1946; 60 Stat. 243; 5 U. S. C. 1009(e):

"So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law . . . It shall . . . hold unlawful and set aside agency action . . . found to be . . . not in accordance

with law . . . [or] without observance of procedure required by law . . ."

2. Sec. 1 of the Declaratory Judgments Act of June 25, 1948; 62 Stat. 964; 28 U.S.C. 2201:

"In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration . . ."

3. Secs. 10 (a) (b) (c) of the Administrative Procedure Act (supra); 5 U.S.C. 1009 (a) (b) (c):

"Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof. The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction . . .) in any court of competent jurisdiction Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review . . ."

4. Sec. 2 (g) of the Administrative Procedure Act (supra); 5 U.S.C. 1001 (g):

"'Agency action' includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."

STATEMENT OF POINTS

1. The Court below erred in rendering a judgment for Appellant (Plaintiff below) which neither declared Appellant's demotion invalid, decreed that it be set aside, nor required Appellees (Defendants below) to rescind it, in view of the Court's findings that the demotion was

invalid and in violation of his rights under the Veterans Preference Act and the regulations of the Civil Service Commission.

2. The Court below erred in decreeing for Appellant (Plaintiff below) only ". . . that the Defendants [Appellees] take appropriate action, consistent with this judgment . . .," without specifying the action to be taken.

3. The Court below erred in holding that it had no jurisdiction to adjudicate Appellant's (Plaintiff below) third count, a cause of action for declaratory and mandatory relief on account of his reduction in pay in violation of his rights under the Salary Retention Act.

SUMMARY OF ARGUMENT

(Points 1 and 2)

The Administrative Procedure Act⁹ specifies the judgment that shall be granted to this Appellant (Plaintiff below), upon a finding that he has been demoted in rank and reduced in pay without reference to the retention preference procedures as required by section 12 of the Veterans Preference Act¹⁰ and the regulations of the Civil Service Commission.¹¹ That act requires that the ". . . reviewing court [court below] shall hold unlawful and set aside agency action . . . found to be . . . not in accordance with law . . . or . . . without observance of procedure required by law . . ." (underscoring added). The Declaratory Judgments Act¹² requires a declaration of Appellant's (Plaintiff below) rights which the trial court found had been violated by ignoring the requirements of the law and the regulations governing his demotion and reduction in pay. The judgment rendered below fulfills none of these requirements; it is for Plaintiff in form only, and affords Plaintiff (Appellant here) none of the relief to which he is entitled in view of the findings.

⁹ Act of June 11, 1946; 60 Stat. 243; 5 U.S.C. 1009(e).

¹⁰ Act of June 27, 1944; 58 Stat. 387, as amended; 5 U.S.C. 861.

¹¹ 5 C.F.R. 1958 supp., secs. 20.1-20.8.

¹² Act of June 25, 1948; 62 Stat. 964; 28 U.S.C. 2201-2.

(Point 3)

A cause of action for declaratory and mandatory relief for failure of an employing Federal agency to maintain the pay of an employee notwithstanding his demotion in grade, as required by the Salary Retention Act,¹³ is within the jurisdiction of the United States District Court for the District of Columbia. There is nothing in the nature of the rights granted to a Federal employee by the Salary Retention Act to distinguish them from any other rights relating to his pay which are frequently declared and enforced by the District Courts. The action is not one for the collection of a sum of money, but for the declaration and enforcement of a continuing right, relief for the violation of which could be granted only in a small measure in the Court of Claims upon an action for salary accrued. The jurisdiction of the District Court over this cause is particularly clear in this case where it is coupled with other causes over which that court exercised its jurisdiction, the same evidence applies to all causes, and further litigation can be rendered unnecessary by adjudicating all causes (citations infra).

A R G U M E N T

Point 1

THE COURT BELOW ERRED IN RENDERING A JUDGMENT FOR APPELLANT (PLAINTIFF BELOW) WHICH NEITHER DECLARED APPELLANT'S DEMOTION INVALID, DECREED THAT IT BE SET ASIDE, NOR REQUIRED APPELLEES (DEFENDANTS BELOW) TO RESCIND IT, IN VIEW OF THE COURT'S FINDINGS THAT THE DEMOTION WAS INVALID AND IN VIOLATION OF HIS RIGHTS UNDER THE VETERANS PREFERENCE ACT AND THE REGULATIONS OF THE CIVIL SERVICE COMMISSION.

The judgment that should have been rendered for Appellant (Plaintiff below) in view of the findings, is specified by section 10 (c) of the Administrative Procedure Act,¹⁴ one of the Acts relied upon by Appellant for the jurisdiction of the court below (J.A. 2). That Act requires

¹³ Act of June 18, 1956; 70 Stat. 291; 5 U. S. C. supp. V, 1107.

¹⁴ Act of June 11, 1946; 60 Stat. 243; 5 U. S. C. 1009(e).

that the ". . . reviewing court [court below] shall hold unlawful and set aside agency action . . . found to be . . . not in accordance with law . . . or . . . without observance of procedure required by law" (underscoring added).

Likewise, the judgment that should have been rendered for Appellant (Plaintiff below) in view of the findings, is indicated by the Declaratory Judgments Act,¹⁵ also relied upon by Appellant for the jurisdiction of the court below (J.A. 2). That Act provides that the court ". . . upon the finding of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration"

The trial court, in its opinion (J.A. 8), which it adopted as its findings of fact and conclusions of law (J.A. 12), and in its judgment J.A. 17) found that:

1. Appellant's (Plaintiff below) demotion was subject to section 12 of the Veterans Preference Act (supra) and the regulations of the Civil Service Commission (supra); and
2. Appellant's rights under the Act and regulations had been ignored in connection with his demotion.

Inasmuch as these findings are set forth somewhat haphazardly in the trial court's oral opinion and judgment and were stated without what might have been the more studied aid of counsel, quotations from the record follow:

" . . . Section 12 of the Veterans Preference Act, 5.U.S.C. 861, is applicable to Plaintiff's demotion" (J.A. 17).

"It cannot be disputed that if the action of the government in this case was taken in connection with a reduction in personnel, it was invalid (underscoring added) (J.A. 9) . . . the Court is of the opinion that the phrase reduction in personnel must comprise an action of the type involved here, namely, a change to a lower grade (J.A. 11) . . . the court is of the opinion that, under the facts of this case, the plaintiff is entitled to a veteran's

¹⁵ Act of June 25, 1948; 62 Stat. 964; 28 U.S.C. 2201-2.

preference and will render a declaratory judgment accordingly, on the basis of which the defendants will be required to take appropriate administrative action not inconsistent with this ruling" (J.A. 11).

In a subsequent colloquy with counsel the trial court confirmed and emphasized its findings, as follows:

" . . . I am rendering a declaratory judgment to the effect that the plaintiff is entitled to veteran's preference under Section 12 of the Veterans Preference Act and that, therefore, the entire administrative action should be set aside and a new administrative action taken (J.A. 12) . . . his [Appellant's] rights under Section 12 have certainly been ignored (J.A. 13) . . . I have held that they were violated" (J.A. 14).

Upon these findings and in view of the explicit provisions of the Administrative Procedure Act (supra) and the Declaratory Judgments Act (supra), the judgment that should have been rendered below seems apparent. An example of a proper judgment in a similar case in this District Court may be found in O'Brien v. Matthews, Civil Action number 2986-52 (unreported), quoted in full by the United States Court of Claims in O'Brien v. U. S., 124 Ct. Cl. 655 at 668. There the District Court clearly and concisely declares the employee's rights, sets aside the erroneous action of the employing agency, and orders the restoration of the employee to his former position.

Similarly, in Reynolds v. Wilson (Lovett) et al, Civil Action No. 424-49, in the U. S. District Court for the District of Columbia (unreported), the final judgment for the complaining employees was rendered, presumably, with meticulous care because a previous judgment, adverse to the employees, had been reversed on appeal to this Court in Reynolds v. Lovett, C.A., D.C. 1952; 91 U.S. App. D.C. 276; 201 F. 2d 181 (cert. denied 345 U.S. 926, 73 S. Ct. 784). Acting upon the mandate of this Court of Appeals the District Court set aside and vacated the reversed judgment, and then:

"Ordered, Adjudged and Decreed, that in accordance with the judgment of the United States Court of Appeals for the District of Columbia, that defendants, and each of them, are hereby ordered and directed to restore each of the plaintiffs in this case to their rightful positions and grades in the Mare Island Naval Shipyard as of the date of each's illegal and unlawful reduction in grade, that is to say: 1. That the plaintiff Clark F. Reynolds, be restored to duty and pay status of a Leadingman Welder in the Mare Island Naval Shipyard as of June 28, 1947, and that he be granted the benefit of all rights, emoluments, and privileges flowing from a continuity of service from the time of his wrongful reduction in grade on June 28, 1947 to date of his restoration as if said demotion in grade had not taken place."

Similar judgment was rendered for each of the other Plaintiffs.

In concurring in the judgment in the Court of Appeals in the foregoing case of Reynolds v. Lovett, Circuit Judge Clark remarked:

"Yet notwithstanding the policy expressed in the Act, passed by the Congress, signed by the President, and duly promulgated, the Secretary of the Navy reduced appellants in rank below certain non-preference employees . . . In my judgment, the defiance of the law and disregard of the will of Congress on the part of administrative bureaucrats is a greater menace to our institutions than the threat of the atomic bomb."

The only proper and lawful judgment that could be rendered upon the findings and conclusions of the trial court is one declaring Appellant's (Plaintiff below) rights, setting aside his demotion, and requiring Appellees (Defendants below) to restore him to his previous grade and pay.

Point 2

THE COURT BELOW ERRED IN DECREETING FOR APPELLANT (PLAINTIFF BELOW) ONLY ". . . THAT THE DEFENDANTS [APPELLEES] TAKE APPROPRIATE ACTION, CONSISTENT WITH THIS JUDGMENT . . ." WITHOUT SPECIFYING THE ACTION TO BE TAKEN.

Appellant's Point 1 shows what the judgment for Appellant (Plaintiff below) should have been in view of the findings and conclusions of the trial court. This Point 2 will show that the judgment as it was rendered cannot stand.

It is elemental that a judgment must apprise the parties litigant of their respective rights and duties relating to the matter at issue; that it must adjudicate. A judgment must be certain (49 C.J.S., Judgments, sec. 72); it must conform to the findings (49 C.J.S., Judgments, sec. 55); it must be complete in itself, without necessity for extraneous references (sec. 62b); it must be enforceable by process (sec. 67); "it must fix clearly the rights and liabilities of the respective parties to the cause. . . " (sec. 72 at n. 16-20).

No rights or duties of the parties can be predicated upon the judgment of the court below. Appellant cannot compel, nor indeed can Appellees take ". . . appropriate administrative action . . ." with no specification of what "appropriate" may mean. To be sure, what would be "appropriate" seems obvious in view of the court's findings and the requirements of the Statutes and of the regulations of the Civil Service Commission, but that fact has not served to preserve Appellant's rights in the past, and there is no reason to suppose that it will do so now or in the future.

To be sure, the record, not the judgment, does indicate what in the opinion of the trial judge "appropriate" action by the Appellees (Defendants below) would be. This is brought out in a colloquy between court and counsel when Appellant presented a form of judgment for the signature of the judge, and Appellees (Defendants below) objected thereto

(J.A. 12-16). Appellant supposed that the form of judgment presented suitably reflected the court's decision. The court at first seemed to accept the form presented:

"MRS. PARK [opposing counsel]: . . . As I understood your Honor's ruling, it was that the administration was in error in determining Section 12 [of the Veterans Preference Act] did not apply and that the agency should now apply Section 12 and determine his rights under it.

"THE COURT: Well, I am rendering a declaratory judgment to the effect that the Plaintiff is entitled to veterans preference under Section 12 of the Veterans Preference Act and that, therefore, the entire administrative action should be set aside and a new administrative action taken.

"MRS. PARK: That was my understanding.

"THE COURT: Yes. What is your criticism?

"MRS. PARK: As it is now worded, your Honor, it appears to me that it would hold his rights have been violated under Section 12 without the agency having a chance to determine his rights under Section 12.

"THE COURT: Well, his rights under Section 12 have certainly been ignored.

"MRS. PARK: Right, your Honor. They said Section 12 does not apply and I understood your Honor now to mean it does apply.

"THE COURT: [reading from Appellant's proposed form of judgment] . . . Then we say, 'And it is further ordered and adjudged that the defendants take appropriate administrative action consistent with this judgment to rescind plaintiff's demotion on March 11, 1956, and to restore plaintiff to the grade and pay to which he would have been and would now be entitled if he had not been so demoted.'

"Any objection to that? That seems to be all right.

"MRS. PARK: Well, if your Honor please, if they determine that under Section 12 there have

been no rights violated they would not restore him --

"THE COURT: I have held that they were violated."

In view of the court's opinion and the colloquy between court and counsel up to this point, the form the judgment finally took, as revised by the judge, is inexplicable. The matter stricken by the judge from the form presented by counsel appears on its face (J.A. 17). The judgment lost all force and substance in the hands of the trial judge, and remains a judgment for Appellant (Plaintiff below) in form only.

Appellant can cite no case where such an unlikely judgment was rendered by a District Court. Appellant has given several citations under his Point 1 which show what the judgment should have been. Normally, the issues in the trial court as well as on appeal relate to the sufficiency or propriety of the findings and conclusions. In the case at bar, the judgment itself is the matter at issue -- its sufficiency and propriety in view of the findings and conclusions. The lack of any such issues in reported cases arising under the Veterans Preference Act may be taken as some indication of the error in the judgment of the trial court.

Why did the trial court refuse, in the face of Appellant's pleading, (J.A. 14-16) to render a judgment that would suitably declare Appellant's rights, set aside his invalid demotion, and require Appellees to take "appropriate action" to these specific ends? Apparently because the court below became obsessed with a novel and erroneous idea as to what action would be "appropriate".

That novel and erroneous idea was that the judgment should operate, as the court says, "nunc pro tunc"; that Appellees (Defendants below) should be permitted to reconstruct the situation as it was on the date of Appellant's demotion to determine what the effect would have been if the retention preference procedures had then been applied (J.A. 14-15). Apparently the idea was that if such post mortem appli-

cation of the requirements should show that Appellant would not have been demoted, he should now be restored; otherwise not.

Assuming that the colloquy between court and counsel does reflect the trial judge's ideas as to how the judgment should operate, yet the fact remains that the judgment rendered makes no provision for any such "nunc pro tunc" action by the Appellees' nor indeed for any action by them. They are as free to ignore the judgment as they assumed to be free to ignore the requirements of Act and the regulations in connection with Appellant's demotion.

Moreover, even if the judgment should be made to speak "nunc pro tunc", as the trial court seems to have intended, it would be manifestly contrary to law. The expression "nunc pro tunc" is applied to a judgment correcting some error in an existing judgment; it makes the original judgment speak as it was intended it should. Section 12 of the Veterans Preference Act (supra) and the retention preference procedures of the Civil Service Commission (supra) require the application thereof before, not after the employee has been demoted.

Aside from the legal and procedural requirements, such a judgment would be manifestly unfair and unreasonable. The Retention Preference Regulations require the compilation of retention registers showing the preference rights of employees who may be affected by a pending action, and permits them to examine and contest the showing made if they deem it erroneous. After the passage of several years, numerous shifts in positions, and resignations or dismissals from the service, the possibility of contesting the showing made of retention rights as they previously existed is greatly reduced.

Finally, supposing that this judgment should be made "nunc pro tunc", an employee dissatisfied with the employing agency's determination of his preference rights would be deprived of his right to appeal to the Civil Service Commission. This Appellant has already appealed to the Civil Service Commission on the only ground then

available to him: failure of the employing agency to report to the Retention Preference Regulations before demoting him. If the employing agency now applies the regulations, "nunc pro tunc", and this Appellant deems the application erroneous, must he again appeal to the Civil Service Commission on this new ground? This Appellant does not believe that any such hardship should be imposed upon him as a result of Appellees' dereliction with respect to his statutory rights in the first instance.

The only lawful, just, or reasonable judgment to be rendered upon the findings and conclusions of the trial court is one declaring Appellant's rights, setting aside his demotion, and requiring Appellees to restore him to his previous grade and pay.

Point 3

THE COURT BELOW ERRED IN HOLDING THAT IT HAD NO JURISDICTION TO ADJUDICATE APPELLANT'S (PLAINTIFF BELOW) THIRD COUNT, A CAUSE OF ACTION FOR DECLARATORY AND MANDATORY RELIEF ON ACCOUNT OF HIS REDUCTION IN PAY IN VIOLATION OF RIGHTS UNDER THE SALARY RETENTION ACT.

The trial court based its refusal to adjudicate this count on the following statement in its opinion:

"As concerns the claim under the Retention of Salary Act, different considerations prevail. It is well established that the Court of Claims has exclusive jurisdiction of actions on the part of government officers and employees for compensation for services. The Court of Appeals in the case of Di Benedetto versus Morgenthau, 80 Appeals D.C. 34, has held that this provision of law is equally applicable to actions for declaratory judgment to adjudicate the right of a government officer or employee to receive certain compensation claimed by him."

What are the "different considerations" referred to by the trial court? The action was not one "on the part of officers and employees

for compensation for services," as stated by the court. The third count alleges facts to show that Appellant's rate of salary was preserved by the Salary Retention Act¹⁶ regardless of his demotion, and seeks the declaration of the court to that effect and its mandate to the Appellees to restore Appellant's former rate of pay. A judgment for Appellant on this count would not have been a judgment for money, and could not have been enforced as such.

Any action by an employing agency that affects an employee's grade necessarily affects his rate of pay. An adjudication that an employee is entitled to a higher grade is in effect an adjudication that he is entitled to a higher rate of pay, yet such adjudications are frequently made by the District Court. They are not adjudications for money such as the Court of Claims would make. Likewise, an adjudication that Appellant is entitled to the rate of pay incidental to the grade he held before his demotion would not be a judgment for money.

Even if it should be held that Appellant's third count is in the nature of an action for money, yet it has been held that the Federal District Court taking jurisdiction over one issue of a declaratory judgment action has jurisdiction to settle all issues in the action.¹⁷ Moreover, the Rules of the U. S. District Courts state: "The existence of another adequate remedy does not preclude a judgment for declaratory relief in a case where it is appropriate."¹⁸

The sole authority cited by the court below for its holding that it had no jurisdiction over Appellant's third count is the earlier (1945) case of Di Benedetto v. Morgenthau.¹⁹ There the employees had worked on several legal holidays, and sought the declaration of the District Court that they were entitled to overtime pay for such work. The only question involved was the amount of the pay for past services on a few holidays,

¹⁶ Act of June 18, 1956, 70 Stat. 291; 5 U.S.C. Supp. V, sec. 1107.

¹⁷ Albuquerque Broadcasting Co. v. Regents, 70 F. Supp. 198.

¹⁸ Fed. R. Civ. P. 57.

¹⁹ 80 U.S. App. D.C. 34, 148 F. 2d 223.

the permanent grade and rate of pay for continuing services not being in question. As the court there says:

"... their remedy lies in the Court of Claims, not in the District Court, to recover extra compensation for overtime services. Full relief is available in the Court of Claims for such purposes."

Full relief is not available to this Appellant in the Court of Claims. This Appellant continues in his regular employment as a career employee, and is entitled to have the rate of pay for his continuing services fixed pursuant to the Salary Retention Act (supra). The Court of Claims could do no more than give Appellant judgment for his accrued salary at the proper rate. Appellant would have to sue periodically in the Court of Claims to recover the accrued salary due him.

The trial court had and should have exercised its jurisdiction to adjudicate Appellant's third count for retention of his salary at the same rate notwithstanding his demotion in grade. All of the evidence necessary to adjudicate the count was before the court, and Appellant (Plaintiff below) submitted it for adjudication.

THE IMPORTANCE OF THIS CASE

Inasmuch as this case does not come to this appellate court for a review of the findings of fact of the court below, it has seemed necessary to present it so far as a matter of cold legalisms: -- the propriety and sufficiency of the judgment rendered for Appellant (Plaintiff below) in view of the findings. The case, however, is of importance beyond the mere legal issues. This appellate court need not act in a vacuum as to matters of deeper significance underlying this attempt of a single Government employee to enforce his statutory rights.

No doubt there may be disagreement with the philosophy of veterans' preference in Federal employment. There can be no valid

disagreement, however, with the requirement of compliance by Federal agencies with the mandates of the Acts of Congress which they are appointed to administer. Moreover, the Veterans Preference Act, although so-called, is not limited in its application to veterans, but is the statutory basis for the entire Federal system of retention preference with respect to tenure of employment, length of service, and efficiency ratings, as well as military preference.

The record before this court shows that Appellant was and remains a career employee with a long and honorable service (although currently reduced in grade). His demotion occurred in a "reorganization" of the large legal office in which he served, and had nothing to do with his record of service or ability as a lawyer (J.A. 2-3, 15-16). This court may take judicial cognizance of the fact that in 1953 the administration of our Government changed from Democratic to Republican, and that thereafter there were many news reports of political pressures exerted to fill Federal posts with known supporters of the party newly in control. The record does not show the political faith of those brought into the service to supplant such career employees as Appellant.

The importance of this case is that the decision will bear on the preservation of the career service in Federal employment.

CONCLUSION (RELIEF)

The judgment of this court on appeal should:

1. Vacate the judgment below.
2. Order a new judgment for Appellant (Plaintiff below) on his first count:
 - a. declaring his demotion invalid as of the date thereof,
 - b. setting aside his demotion as of the date thereof, and

- c. restoring him to his former grade and pay as of the date of his demotion, to the same effect as if it had never occurred.

3. Remand the cause of action on Appellant's third count for the adjudication thereof on the evidence now in the record.

Respectfully submitted.

J. L. HOFFLUND

3041 Dogwood Street, N. W.
Washington 15, D. C.

Appellant, Pro se.

(i)
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JOINT APPENDIX

J. L. HOFFLUND, Plaintiff, in propria
 persona,
 3041 Dogwood Street, N. W.,
 Washington 15, D. C.

v.

THE SECRETARY OF THE INTERIOR, Fred A.
 Seaton; and the CHAIRMAN AND MEMBERS
 OF THE UNITED STATES CIVIL SERVICE
 COMMISSION, Philip Young, George M.
 Moore, and Frederick J. Lawton.

DOCKET ENTRIES

12/21/56	Complaint
2/19/57	Answer
8/21/57	Defendants' Motion for summary judgment
9/5/57	Cross motion of plaintiff for summary judgment
9/17/57	Defendants' opposition to Plaintiff's motion for summary judgment
9/26/57	Consent order substituting Harris Ellsworth & Christopher H. Phillips as parties defendants for Philip Young & George Moore
10/9/57	Order denying plaintiff's and defendants' motions for summary judgment
10/18/57	Motion of defendants for reconsideration
10/28/57	Opposition of plaintiff to defendants' motion for reconsideration
11/6/57	Order denying defendants' motion for reconsideration
5/2/58	Order substituting Bernard L. Flanagan as party defendant in lieu of Christopher H. Phillips
5/2/58	Pretrial proceedings
5/9/58	Certificate of readiness
7/30/58	Hearing
7/31/58	Judgment
9/2/58	Transcript of proceedings of 7/31/58

9/23/58	Notice of Appeal
9/23/58	Cost bond
10/31/58	Record on appeal del'd to USCA
11/14/58	Stipulation for supplemental record to be filed
11/14/58	Transcript of proceedings of 7/30/58
11/14/58	Supplemental Record on appeal delivered to USCA

[Filed December 21, 1956]

COMPLAINT

First Count

1. This is an action for declaratory and mandatory relief with respect to a reduction in the grade and pay of a Veteran in violation of his preference rights under the Veterans Preference Act of 1944 (5 U.S.C., secs. 851-869).

2. Jurisdiction of this Court is provided by Section 10 of the Administrative Procedure Act (5 U.S.C., sec. 1009) and the Declaratory Judgments Act (28 U.S.C., secs. 2201-2202).

3. Plaintiff has exhausted any administrative remedies afforded him by replying to the Department's notice of intention to demote and by appeals to the Civil Service Commission under the provisions of the Veterans Preference Act (supra) and the regulations of the Civil Service Commission. The Civil Service Commission, under date of October 27, 1956, rendered its final decision denying Plaintiff's appeal and affirming the demotion here complained of.

4. Plaintiff for some 15 years has been and still is a permanent, career employee in the competitive classified civil service of the United States, occupying a legal position in the Department of the Interior. Plaintiff is a "preference eligible" within the meaning of the Veterans Preference Act of 1944 (supra), as amended. Plaintiff's efficiency ratings at all times mentioned herein have been and still are "'good' or better" within the meaning of Section 12 of the Veterans Preference Act (5 U.S.C., sec. 861).

5. Prior to May 10, 1954, Plaintiff was Chief Counsel, Defense Minerals Exploration Administration, an agency in the Department of the Interior, and Plaintiff and his staff performed the legal functions of that agency. On or about May 10, 1954, the Office of the Solicitor was reorganized, and various new legal positions were established therein. Effective May 10, 1954, the legal functions of the various bureaus, agencies, and offices of the Department, including the legal functions of Defense Minerals Exploration Administration, were transferred to the reorganized Office of the Solicitor; and all legal personnel, including Plaintiff, were transferred to and assigned to new positions in that office without change of grade or pay.

6. At the time of said transfer of functions and personnel to the reorganized office of the Solicitor, grades and rates of pay had not been allocated to the newly-established positions to which the transferred legal personnel were assigned without change of grade or pay. At the same time, various of these newly-established positions were filled by the appointment of additional employees from outside the Civil Service with no preference rights whatever.

7. Plaintiff has continued to occupy his new position in the Office of the Solicitor from the date of his assignment thereto, and still does occupy it. The grade and rate of pay of Plaintiff's new position remained the same as before the reorganization of the legal functions, until March 11, 1956. Effective that date, grades and rates of pay were allocated to the new offices in the reorganized Office of the Solicitor, those allocated to Plaintiff's new position being lower than those previously held by him, resulting in his demotion. At the same time, the grades and rates of pay allocated to those new positions which were filled by the appointment of additional employees from outside the Civil Service were as high or higher than Plaintiff's previous grade and pay.

8. At the time of said transfer of functions and personnel, Plaintiff was qualified for appointment to one of the positions which were filled by the appointment of additional employees from outside the Civil Service, with no preference rights whatever, as aforesaid.

Second Count

1. Plaintiff hereby refers to his first count and to paragraphs 1, 2, 3, and 4 thereof, and hereby makes the same a part of this, his second count, the same as if set forth in full at this point.

2. Prior to March 11, 1956, Plaintiff's grade and rate of pay were GS-15, \$12,420 per annum. By personnel action dated March 7, 1956, effective March 11, 1956, Plaintiff's grade and rate of pay were reduced to GS-14, \$11,395 per annum. Plaintiff, beginning March 11, 1956, has continued to occupy and still does occupy a position at said reduced grade and rate of pay.

3. Said demotion of Plaintiff in grade and pay was effected pursuant to a notice dated February 1, 1956, from the employing Department to Plaintiff, stating as the sole reason for the action the reorganization of the legal functions of the Department.

Third Count

1. Plaintiff's third count is alternative to his first and second counts, and the relief sought thereon is prayed for only in the event that judgment should be adverse to Plaintiff on both his first and second counts. This third count is for declaratory and mandatory relief with respect to a reduction in the grade and pay of Plaintiff as an employee of the Government of the United States, in violation of his rights with respect to the preservation of his pay under the Act of June 18, 1956 (Public Law 594 - 84th Congress).

2. Plaintiff hereby refers to his first count and to paragraph 2 thereof and makes the same part of this, his third count, the same as if set forth in full at this point.

3. No special administrative remedy is afforded to Plaintiff with respect to this third count, and Plaintiff is without remedy except by the judgment of a court of competent jurisdiction.

4. Plaintiff for some 15 years has been and still is a permanent, career employee occupying a legal position in the United States Department of the Interior. During the period beginning May 10, 1954, and ending immediately prior to June 18, 1956, the date of the enactment of

Public Law 594 - 84th Congress, Plaintiff continuously held a position in grade GS-15 of the General Schedule, a basic compensation schedule of the Classification Act of 1949, as amended (63 Stat. 958, 5 U. S. C., secs. 1101-1106), which position was placed during said period, to wit: effective March 11, 1956, in a lower grade of said schedule, to wit: GS-14, under a reclassification of said position pursuant to said Classification Act.

5. Plaintiff continued to hold said position, reduced in grade as above set forth, on June 18, 1956, the date of enactment of said Public Law 594 - 84th Congress; still does hold it; and has held it for a continuous period of not less than two years ending immediately prior to the date of enactment of said Public Law 594.

6. Plaintiff's performance of the work of said position at all times during the said two years and on June 18, 1956, was satisfactory or better than satisfactory.

7. Effective as of the first day of the first pay period which began after June 18, 1956, the date of enactment of Public Law 594 - 84th Congress, to wit: effective beginning July 1, 1956, Plaintiff, by virtue of the facts above stated, became entitled to "the rate of basic compensation to which he was entitled immediately prior to such reclassification of his position, including any increases in such rate of basic compensation provided by law at any time while Plaintiff was in such position . . ."

8. The Defendants, beginning July 1, 1956, have failed, neglected, and refused, and still do fail, neglect, and refuse to pay and cause to be paid to Plaintiff the compensation of a GS-15 at the rate to which he would have been entitled except for said downgrading of his position; but continue, beginning with said date, to pay or cause to be paid to Plaintiff the reduced compensation of a GS-14; all in violation of the provisions of said Public Law 594 - 84th Congress.

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Wherefore, Plaintiff prays for the judgment of the Court as follows:

1. As to Plaintiff's first and second counts: a declaration that the downgrading of Plaintiff's grade and pay effective March 11, 1956,

was in violation of Plaintiff's rights as a "preference eligible" under the Veterans Preference Act of 1944, as amended (*supra*), and should be rescinded, and Plaintiff's previous grade and pay restored; and for the mandate of the Court to the Defendants to rescind said demotion and to restore Plaintiff's grade and pay to what it would have been and would now be except for said demotion.

2. As to Plaintiff's third count, in the alternative, if the Court does not give judgment for Plaintiff on one or both of his first and second counts: a declaration that effective July 1, 1956, Plaintiff became entitled to the rate of basic compensation to which he was entitled immediately prior to the reclassification of his position, including any increases in such rate of basic compensation provided by law at any time while Plaintiff occupied said position; and the mandate of the Court to the Defendants to restore Plaintiff's pay, effective July 1, 1956, as it would have been on that date if his position had not been so reclassified.

3. As to all of Plaintiff's causes of action: for such general relief as may be proper in the premises.

Dated: Dec. 21, 1956.

/s/ J. L. Hofflund,
Plaintiff in propria persona

[Filed February 19, 1957]

ANSWER

First Defense

Complaint fails to state a claim upon which relief may be granted.

Second Defense

Answering the numbered paragraphs of the complaint specifically, defendants aver as follows:

First Count

1 and 2. Defendants are not required to answer the allegations contained in paragraphs 1 or 2.

3. Admitted, except that defendants aver that the final decision of the Civil Service Commission was dated October 29, 1956.

4. Admitted.

5. Admitted, except that defendants aver that formal action transferring employees and their possessions to the Office of the Solicitor was effected on July 1, 1954.

6. The allegations contained in the first sentence of paragraph 6 are admitted. The allegations contained in the second sentence of paragraph 6 are deemed immaterial since they involve Schedule C positions.

7. In answer to paragraph 7, defendants aver that from July 1, 1954, to March 11, 1956, plaintiff performed successive assignments in the Office of the Solicitor, and was formally assigned to the position of Assistant Solicitor, Branch of Mines, Division of Mineral Resources, on March 11, 1956, when his duties and responsibilities were allocated to GS-14. The allegations contained in the last sentence of paragraph 7 are deemed immaterial since they concern Schedule C positions.

8. The allegations contained in paragraph 8 are conclusions which require no answer, but if deemed material, they are denied.

Second Count

1. In answer to paragraph 1, defendants adopt the answers to paragraphs 1, 2, 3 and 4 of the First Count of the complaint.

2. Admitted.

3. In answer to paragraph 3, defendants refer the court to the notice dated February 1, 1956, for its contents.

Third Count

1. Defendants are not required to answer the allegations contained in paragraph 1.

2. In answer to paragraph 2, defendants adopt their answer to paragraph 2 of the First Count of the complaint.

3. Denied.

4. The first sentence in paragraph 4 is admitted. In answer to the remaining allegations of paragraph 4, defendants admit the plaintiff held a GS-15 position but deny that he had continuously held the same position from May 10, 1954, to March 11, 1956, at which time his duties and responsibilities were allocated to grade GS-14.

reduced to a lower grade with a consequent reduction in salary, although he continued to perform more or less substantially similar duties.

He seeks a declaratory judgment to the effect that this action was in violation of his rights under the Veterans Preference Act. This claim is set forth in the first count of the complaint.

He also contends that the action of the government in his case was violative of what is known popularly as the Retention of Pay Act, the Act of June 18, 1956, and he seeks a declaratory judgment under that claim.

The plaintiff's employment and the action downgrading him is not disputed. So too it is not disputed that he is entitled to veteran's preference.

He claims a preference under what is known as Section 12 of the Veterans Preference Act, Section 861 of Title 5 of the United States Code,
3 which provides that in any reduction in personnel in any civilian service of any federal agency, competing employees shall be released in accordance with Civil Service Commission regulations, which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings.

It cannot be disputed that if the action of the government in this case was taken in connection with a reduction in personnel, it was invalid. It is contended by the government, however, that Section 861 is not applicable under the facts in this case because there was no reduction in personnel.

It appears from the administrative record that what happened was that the unit or the group in which the plaintiff was employed was transferred from one agency or subdivision of the Department of Interior to another agency or subdivision of that Department and also shifted from one payroll to another. The question is whether such action constitutes reduction in personnel.

To some extent, that term is ambiguous and, therefore, administrative construction, if not unreasonable, must receive great weight.

The Civil Service Commission issued a regulation known as Section 20.2(a), in which the words reduction in force are defined. It is to be assumed, of course, that the words reduction in force and the words
4 reduction in personnel are synonymous. That regulation interprets or defines the words reduction in force as follows: "Reduction in force is the release of an employee from a competitive level by means of separation from the rolls, furlough for more than thirty days, re-assignment involving displacement, or change to lower grade."

The government does not deny that if this is to be the definition of reduction in personnel, then Section 12 of the Veterans Preference Act, that is, 5 United States Code 861, governs. The government denies, however, that this definition should be applicable in this case. The government's contention is based to a large part on the fact that this regulation was adopted subsequent to the time when the plaintiff's alleged cause of action arose.

Manifestly, under ordinary circumstances administrative regulations, just as acts of Congress, are prospective and have no retroactive effect. This principle is not necessarily applicable, however, to an interpretive regulation, that is, a regulation that interprets or defines the meaning of a term, especially if promulgating a definition is within the scope of the activities of the agency.

In this instance there can be no doubt that the Civil Service Commission has authority to promulgate such a regulation, especially since Section 861 specifically and expressly confers that power on the Com-
5 mission.

I do not mean by that that the Commission could by regulation attach a meaning to words that is obviously contrary to the general understanding as to what they mean, but it does have the authority to interpret or define the meaning of terms that are either ambiguous, indefinite, or flexible.

That being so, it is not of too much importance that this definition was promulgated subsequent to the date when the cause of action arose. It is only evidence of the meaning of the term, evidence coming from a most responsible source. Obviously, the Commission would not say

that words that were defined on the date the regulation was promulgated meant something else the day before.

Consequently, the Court is of the opinion that the phrase reduction in personnel must comprise an action of the type involved here, namely, a change to lower grade.

There is nothing in the case of Steinkirchner versus Wilson, 101 Appeals D. C. 92, on which the government relies, that is contrary to the foregoing reasoning. The Steinkirchner case merely holds that the Veterans Preference Act does not apply unless there is a reduction in personnel. It does not define what constitutes reduction in personnel.

Those words are defined, however, as heretofore indicated, in the regulations of the Civil Service Commission, and defined in such a way as to comprehend the action here involved.

Consequently, the Court is of the opinion that, under the facts of this case, the plaintiff is entitled to a veteran's preference and will render a declaratory judgment accordingly, on the basis of which the defendants will be required to take appropriate administrative action not inconsistent with this ruling.

In view of the conclusion the Court has reached, it becomes unnecessary to adjudicate the plaintiff's claims to such rights as he may or may not have under Section 14 of the Veterans Preference Act, that is, Section 863 of Title 5 of the United States Code.

As concerns the claim under the Retention of Salary Act, different considerations prevail. It is well established that the Court of Claims has exclusive jurisdiction of actions on the part of government officers and employees for compensation for services. The Court of Appeals in the case of Di Benedetto versus Morgenthau, 80 Appeals D. C. 34, has held that this provision of law is equally applicable to actions for declaratory judgment to adjudicate the right of a government officer or employee to receive certain compensation claimed by him.

Consequently, this Court has no jurisdiction over the third count.

Accordingly, a declaratory judgment, as indicated, will be rendered for the plaintiff on counts one and two of the complaint and count three will be dismissed for lack of jurisdiction.

Counsel may submit a proposed form of judgment. The Court requests that the proposed judgment be submitted not later than Friday morning.

MRS. PARK: Your Honor, may your opinion serve as findings of fact and conclusions of law?

THE COURT: Yes. A transcript of the Court's decision will constitute the findings of fact and conclusions of law.

[Filed September 2, 1958]

Washington, D. C.

July 31, 1958

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2 THE DEPUTY CLERK: Are there any preliminary matters to come before the Court?

MR. HOFFLUND: Your Honor will recall the motion you heard yesterday in the case of Hofflund versus Seaton. You directed the plaintiff to prepare a proposed form of judgment. Counsel has done so, but the counsel for the government does not approve of the form.

THE COURT: Have you a counter-draft?

MRS. PARK: I would just like to omit some of that.

THE COURT: What is your criticism?

MRS. PARK: In the first paragraph that begins "Ordered," after the semicolon are the words, "and that his demotion was in violation of his rights under that Section and should be rescinded."

As I understood your Honor's ruling, it was that the administration was in error in determining Section 12 did not apply and that the agency should now apply Section 12 and determine his rights under it.

THE COURT: Well, I am rendering a declaratory judgment to the effect that the plaintiff is entitled to veteran's preference under Section 12 of the Veterans Preference Act and that, therefore, the entire administrative action should be set aside and a new administrative action taken.

3 MRS. PARK: That was my understanding.

THE COURT: Yes. What is your criticism?

MRS. PARK: As it is now worded, your Honor, it appears to me that it would hold that his rights have been violated under Section 12 without the agency having a chance to determine his rights under Section 12.

THE COURT: Well, his rights under Section 12 have certainly been ignored.

MRS. PARK: Right, your Honor. They said that Section 12 does not apply and I understood your Honor now to mean it does apply.

THE COURT: I think the words that "his demotion was in violation of his rights under that Section and should be rescinded," I think that is surplusage because -- as a matter of fact, is "demotion" the proper word? Isn't it "regrading"?

MRS. PARK: Downgrading.

THE COURT: Downgrading is a colloquialism. What is the technical term?

MRS. PARK: Demotion is what they have used.

THE COURT: Have they used demotion? I thought it was regrading. Very well. It seems to me it ought to be ordered and adjudged. This is a final judgment. I am making it read this way: "Ordered and adjudged with respect to counts one and two of the complaint that Section 4 12 of the Veterans Preference Act, 5 U.S. Code 861, is applicable to Plaintiff's demotion on March 11, 1956, in the Department of Interior."

I think the rest of that paragraph can well go out.

Then we say, "And it is further ordered and adjudged that the defendants take appropriate administrative action consistent with this judgment to rescind plaintiff's demotion on March 11, 1956, and to restore plaintiff to the grade and pay to which he would have been and would now be entitled if he had not been so demoted."

Any objection to that? That seems to be all right.

MRS. PARK: Well, if your Honor please, if they determine that under Section 12 there have been no rights violated they would not restore him --

THE COURT: I have held that they were violated.

MRS. PARK: I thought your Honor held that Section 12 applied, but, then, when you apply Section 12, you have to determine who should be demoted first.

THE COURT: Yes.

MRS. PARK: As this is worded, it appears to me that the agency would be foreclosed. They would have to say he is entitled to be restored to grade regardless of the rights of anybody else.

THE COURT: No; that was not my intention. To review and re-
5 consider plaintiff's demotion.

MRS. PARK: I think it could really end, your Honor, that defendants take appropriate administrative action consistent with this judgment. Period.

THE COURT: I think that is correct.

MR. HOFFLUND: If your Honor please, that leaves plaintiff demoted. That is what counsel wants to do, to leave the plaintiff demoted.

THE COURT: I venture to suggest that it is not necessary to reflect on counsel. Mrs. Park is a very able and conscientious government counsel, just as the plaintiff is.

MR. HOFFLUND: I concede that.

THE COURT: But I am not going to direct the government to restore you to your original grade. All I am going to direct the government to do is to go through the procedure required by Section 12.

Now, if under that procedure there is somebody else who is entitled to be preferred to you, that is all well and good.

MR. HOFFLUND: Well, that defeats the whole purpose--

THE COURT: I am not reconstructing the picture. I am directing the government to reconstruct the picture in accordance with the procedure required by Section 12.

You see, they did not follow Section 12. They said it did not apply.
6 I hold that it does. And, therefore, they must reconstruct the picture in accordance with that Section. That is as far as I shall go.

MR. HOFFLUND: But, your Honor, if it does apply, then wasn't the demotion invalid?

THE COURT: I don't know whether it was or not because it may be that it was valid. You must understand that Section 12 does not forbid all demotions. Section 12 only provides for certain preferences in case of demotions.

MR. HOFFLUND: But it requires the application of procedures at that time.

THE COURT: Precisely. That is what I am directing the government to do.

MR. HOFFLUND: But they didn't do it then. Can they do it now?

THE COURT: Yes. In other words, I am directing them to reconstruct the picture nunc pro tunc as of March 11, 1956, following the procedure of Section 12 of the Veterans Preference Act. I am not willing to go beyond that.

MR. HOFFLUND: That defeats the whole purpose of the plaintiff, your Honor.

THE COURT: I don't know that it does. I want them to take the kind of action that they were permitted to take as of the original date under Section 12.

7 MR. HOFFLUND: The law required them to take it then, not now.

THE COURT: I am going to let them take it now nunc pro tunc. And if the matter is reconstituted and the downgrading is found to be wrong, then you would have a right to recover back pay.

I am not going to deprive the government of any rights, any more than I want to deprive you of any rights.

MRS. PARK: Thank you, your Honor.

THE COURT: Before counsel leaves, I want to make this observation, Mrs. Park.

The Court has been impressed with the fact and very much pleased with the fact that this has been a suit conducted in the friendliest possible manner without any ill feeling or animosity or emotion, as is demonstrated by the fact that the plaintiff is continuing in his employment.

The Court has always been impressed with the fact that the plaintiff has been holding, for a great many years, a high ranking legal position

in the Department of Interior, and I think it is fair to say, from the argument that plaintiff has made, that he is a good lawyer.

This is a serious matter. I think his rights under the Salary Retention Act have been violated. I have no jurisdiction under that Act because it is a matter for the Court of Claims, so I am dismissing that count under the Salary Retention Act for lack of jurisdiction only. But
8 whether the Act applies technically or not -- and I am inclined to think it does -- certainly the spirit of the Act has been violated, and I venture to suggest that you might convey my thought to the proper officials of the Department of Interior.

I am not saying this in any critical spirit because they have their problems. We all make mistakes and maybe they made a bona fide error here. And I think if this plaintiff were restored to his prior salary, the whole litigation would be at an end.

MRS. PARK: I can assure your Honor that I had intended to make known your views and to make my own personal recommendation that that be done, and I will do whatever I can to see that that is done.

THE COURT: Because I can see where there is a considerable hardship for a man who has been working for a great many years in a responsible position in the government, to all of a sudden find his salary cut. It isn't fair.

MRS. PARK: I wouldn't like it. I assure your Honor I will do what I can.

THE COURT: It isn't fair and it is contrary to Congressional policy.

MRS. PARK: I shall certainly do what I can and express your
9 views.

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[Filed July 31, 1958]

JUDGMENT

This cause having come on for trial by the Court without a jury, and the Court having considered the evidence and heard argument of counsel for the parties hereto, it is this 31st day of July, 1958, pursuant

to the oral decision of the Court, the transcript of which constitutes findings of fact and conclusions of law,

and adjudged

ORDERED/with respect to counts 1 and 2 of the complaint, ~~that judgment be entered for Plaintiff declaring~~ that Section 12 of the Veterans Preference Act, 5 U. S. C. 861, is applicable to Plaintiff's demotion of March 11, 1956, in the Department of the Interior; ~~and that his demotion was in violation of his rights under that section and should be rescinded;~~ and

and adjudged

It is further Ordered/that Defendants shall take appropriate administrative action, consistent with this judgment, ~~to rescind Plaintiff's demotion of March 11, 1956, and, to restore Plaintiff to the grade and pay to which he would have been and would now be entitled if he had not been so demoted;~~ and

It is further ORDERED that count 3 of the complaint be and it hereby is dismissed without prejudice for lack of jurisdiction.

/s/ Alexander Holtzoff
Judge

[Filed September 23, 1958]

NOTICE OF APPEAL

Notice is hereby given this 23rd day of September, 1958, that J. L. Hofflund, Plaintiff above-named, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 31st day of July, 1958, in favor of the Plaintiff, and against said Defendants.

/s/ J. L. Hofflund, Plaintiff,
in propria persona.

[Filed November 14, 1958]

STIPULATION FOR SUPPLEMENTAL RECORD ON
APPEAL

It is hereby stipulated that the record on appeal in this matter, which was filed and docketed in the United States Court of Appeal for the District of Columbia October 31, 1958, shall be supplemented by the addition thereto of the Official Transcript of Proceedings of July 30, 1958, containing the District Court's "Opinion", and by showing on the District Court's docket the filing of said Official Transcript.

Dated: November 14th, 1958.

/s/ J. L. Hofflund
Appellant, in propria persona

/s/ Harold D. Rhynedance, Jr.
Assistant U. S. Attorney
Attorney for Appellees.

REPLY BRIEF OF APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED JAN 20 1959

Joseph W. Stewart
CLERK

No. 14,768

J. L. HOFFLUND,

v.

450

Appellant,

FRED A. SEATON,
Secretary of the Interior, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J. L. HOFFLUND

3041 Dogwood Street, N. W.
Washington 15, D. C.

Pro Se

UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

No. 14,768

J. L. HOFFLUND,

Appellant,

v.

FRED A. SEATON,
Secretary of the Interior, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

I.

APPELLEES' RESTATEMENT OF THE QUESTION DOES NOT
CHANGE OR MEET THE ISSUE.

Appellant (Plaintiff below) stated his first two questions and corresponding points in terms of whether the judgment awarded to Appellant the relief to which he is entitled as a matter of law. Appellees restate the question in terms of whether the judgment, regardless of the relief to which Appellant is entitled as a matter of law, conforms to the findings.

All that Appellees have done is to change the form of the question. A little consideration reveals that it remains the same question, and that the bald statement that the judgment conforms to the findings does not meet the issue of whether it grants to Appellant the relief to which he is entitled.

Appellees' difficulty in meeting this issue is demonstrated by their failure to cite or make any reference to the Administrative Procedure Act, although Appellant's action and the argument in his brief are expressly based on that Act. That Act in terms requires that the action of the employing agency, i.e., the demotion of Appellant, be "set aside" when it is "found to be . . . not in accordance with law . . . [or] without observance of procedure required by law . . ." That is precisely what the Court below found. Appellees do not contend otherwise. There is no possible way to avoid this issue.

Restatement of the question in terms of conformance with the judgment does not avoid it. Conformance of a judgment with the findings can mean nothing else than that the judgment grants the relief to which the party is entitled in view of the findings. That brings the question right back to Appellant's statement of it.

The Trial Court's findings on this issue are clear. Appellant's (Plaintiff below) action was based on the failure of the Appellees to conform to the requirements of section 12 of the Veterans' Preference Act and the regulations of the Civil Service Commission in connection with his demotion. The Trial Court necessarily found these facts as alleged by Appellant; otherwise that Court could have granted no judgment for Appellant. Of course, the judgment does conform to the findings in so far as it is a judgment for Appellant; it does not conform to the findings in that it does not grant proper relief or in fact any relief.

Actually, Appellees themselves are forced back to this issue. They say (Appellees' brief 10): "The proposed judgment submitted by appellant and objected to by appellees patently did not conform to the

findings and conclusions." The argument on this statement is the following sentence: "Such proposed judgment would have afforded relief which the trial court declined to grant and, which, furthermore, was not required in the circumstances."

We are all agreed that the Trial Court declined to grant the relief prayed for by Appellant (Plaintiff below). Appellees, without argument, simply deny that Appellant was entitled to such relief. The Administrative Procedure Act, which Appellees ignore, declares otherwise.

No doubt Congress foresaw that some administrative agencies might be inclined to evade the requirements of the law and regulations in the expectation that the worst that could happen would be a judgment requiring them to do now what they should have done then--"nunc pro tunc" as the Trial Court puts it. The Administrative Procedure Act forbids any such result. The only possible, reasonable, or just judgment for Appellant (Plaintiff below) is one setting aside his invalid demotion and restoring him to his former grade and pay.

II.

APPELLEES INJECT AN ISSUE NOT MADE BY THE RECORD

Appellant's (Plaintiff below) third count was on the Salary Retention Act for failure of the Appellees to preserve Appellant's salary regardless of his reduction in grade as required by that Act. The finding of the Trial Court on that count was that it is in the category of ". . . actions on the part of government officers and employees for compensation for services. . . ." over which the Court of Claims has exclusive jurisdiction, and that "Consequently, this Court has no jurisdiction over the third count" (J.A. 11).

This error of the Trial Court is sufficiently pointed out in Appellant's opening brief. But Appellees bring in a new contention. They say: "The District Court, nonetheless, may not at this time afford the relief

appellant seeks in count 3, even if appropriate jurisdiction were found to exist, for appellant has failed to show that he had taken advantage of the administrative remedy available to him" (Appellees' brief 15). The administrative remedy referred to is appeal to the Civil Service Commission.

It should be sufficient to point out that the Trial Court made no finding with respect to the exhaustion of the administrative remedy on this count, and that its judgment is not based on any such theory. If that is a proper issue on Appellant's third count it can be adjudicated when that issue is remanded to the Court below, as suggested by Appellant in his opening brief.

Moreover, the fact is that 25 F.R. 1099, cited by Appellees as procedures for appealing to the Civil Service Commission on this count (Appellees' brief 15) is dated February 26, 1957, some months after the institution of Appellant's action on December 21, 1956. Prior to that time, the Civil Service Commission had promulgated no regulations for appeals from the actions of agencies in conflict with the requirements of the Salary Retention Act.

Finally, as soon as the Civil Service Commission promulgated regulations for the purpose, Appellant did appeal to it on the subject of this count, and that appeal has been finally determined by the Commission adversely to this Appellant.

The Trial Court erred in refusing to adjudicate Appellant's third count under the Salary Retention Act.

III.

MISCELLANEOUS CONFUSING OR MISLEADING MATTERS IN APPELLEES' BRIEF

Although nothing but the Trial Court's judgment on its findings is involved in this appeal, yet Appellees spell out at length a statement of their concept of the evidentiary facts under the title "Counterstatement

of the Case." This "counterstatement" makes no reference to the Joint Appendix, is not supported by anything therein, and serves no useful purpose on this appeal.

Under the heading "Summary of Argument" Appellees say: "Since all matters necessary to decision were properly decided, the trial court did not abuse its discretion under the Declaratory Judgments Act in declining to make further findings or to extend the language of the judgment." Neither party asked the Court "to make further findings." This appeal is not from the findings or failure to find; it is from the judgment rendered on findings that were not objected to by either party.

Under the heading "Summary of Argument," Appellees say: "Even if such jurisdiction were found to exist in the trial court, appellant's claim would appear to be barred by reason of failure to exhaust his administrative remedies." The Trial Court made no finding with respect to the exhaustion of administrative remedies. Moreover, the fact is that under date of December 7, 1957, the Civil Service Commission rendered its final judgment on Appellant's appeal to it on this count, the last sentence of which reads: "Your [Appellant's] administrative remedies in this matter have been exhausted."

Under the heading "Argument" (p. 9), Appellees say: "Significantly, the court did not purport to undertake an essentially de novo, administrative type determination of appellant's rights under section 12, and appellant has not contended otherwise. It is clear from the findings that the trial court rejected appellant's request for such a determination to be made by the court, rather than the agency." The fact is that it is significant and clear that Appellant (Plaintiff below) made no such request of the trial Court. The action was not based on any notion that the Trial Court might apply the retention preference procedures, but that it should set aside the demotion action for failure of the Appellees to apply them.

Under the heading "Argument" (p. 10), Appellees say: ". . . nothing precludes him [the trial judge] from amending his prior findings before the formal entry of judgment." The facts are that the trial judge adopted its oral opinion as his findings; that he did not amend but confirmed them in colloquy with counsel; that neither party made any objection to them; and that the only point is the failure of the judgment to give Appellant the relief required by these findings.

Under the same heading (p. 10), Appellees say: "Undisputedly, instances too numerous to mention have occurred over the years when courts have remanded cases to governmental agencies for further appropriate proceedings not inconsistent with the particular findings and conclusions of those courts." Appellant would like to have a citation to just one of these numerous instances where reliance was placed on the Veterans' Preference Act and the Administrative Procedure Act and the Trial Court failed to set aside the improper and invalid action of the agency.

Under the same heading, "Argument" (p. 10), Appellants say in note 3:

"Although the District Court in the Lovett case thereafter issued the particular order on mandate noted by appellant (brief, p. 10), it is significant that this Court merely reversed and remanded the case (much in the manner of the trial court in the instant case) 'for action in accordance with this opinion'."

The fact is that in the Lovett case this Appellate Court made clear in its opinion what action the trial court should take upon the remanded case, and the Trial Court acted accordingly by setting aside the invalid action of the agency and restoring the plaintiff to his former grade and pay. In the case at bar, the Trial Court directed the agency to "take appropriate administrative action, consistent with this judgment." This judgment gives no inkling of what "appropriate administrative action"

may mean, and the subsequent colloquy between Court and counsel shows that the judge did not intend it to mean the relief to which Appellant is entitled.

Under the same heading "Argument" (p. 10), Appellees say: ". . . the administrative action herein appears to rest on what the trial judge has observed in his uncontested findings as 'a bona fide error' on the part of the agency (J.A. 16)." The fact is that the trial judge made no such remark in his findings. The remark he made in his colloquy with counsel was: "We all make mistakes and maybe they made a bona fide error here."

The Appellees say (p. 12): "The record herein establishes that the downgrading action respecting appellant resulted from the operation of the Classification Act of 1949, as amended, 5 U.S.C. §§1071-1153, respecting reorganization of the Department following the curtailment of certain defense-type activities at the close of the Korean conflict." The Trial Court made no such finding, no citation is made to the Joint Appendix to support the statement, and the statement has no relevance on this appeal. They argue from the statement that the action demoting Appellant ". . . is not subject to judicial review," but this obviously was a matter for defense in the Trial Court, and if it was presented there, must have been adjudicated adversely to Appellees.

IV.

CONCLUSION

The Trial Court failed to grant to Appellant (Plaintiff below) the relief to which he is entitled pursuant to the Court's findings of fact on the first count; the judgment below on that count should be vacated and a new judgment entered for Appellant as prayed for in his opening brief.

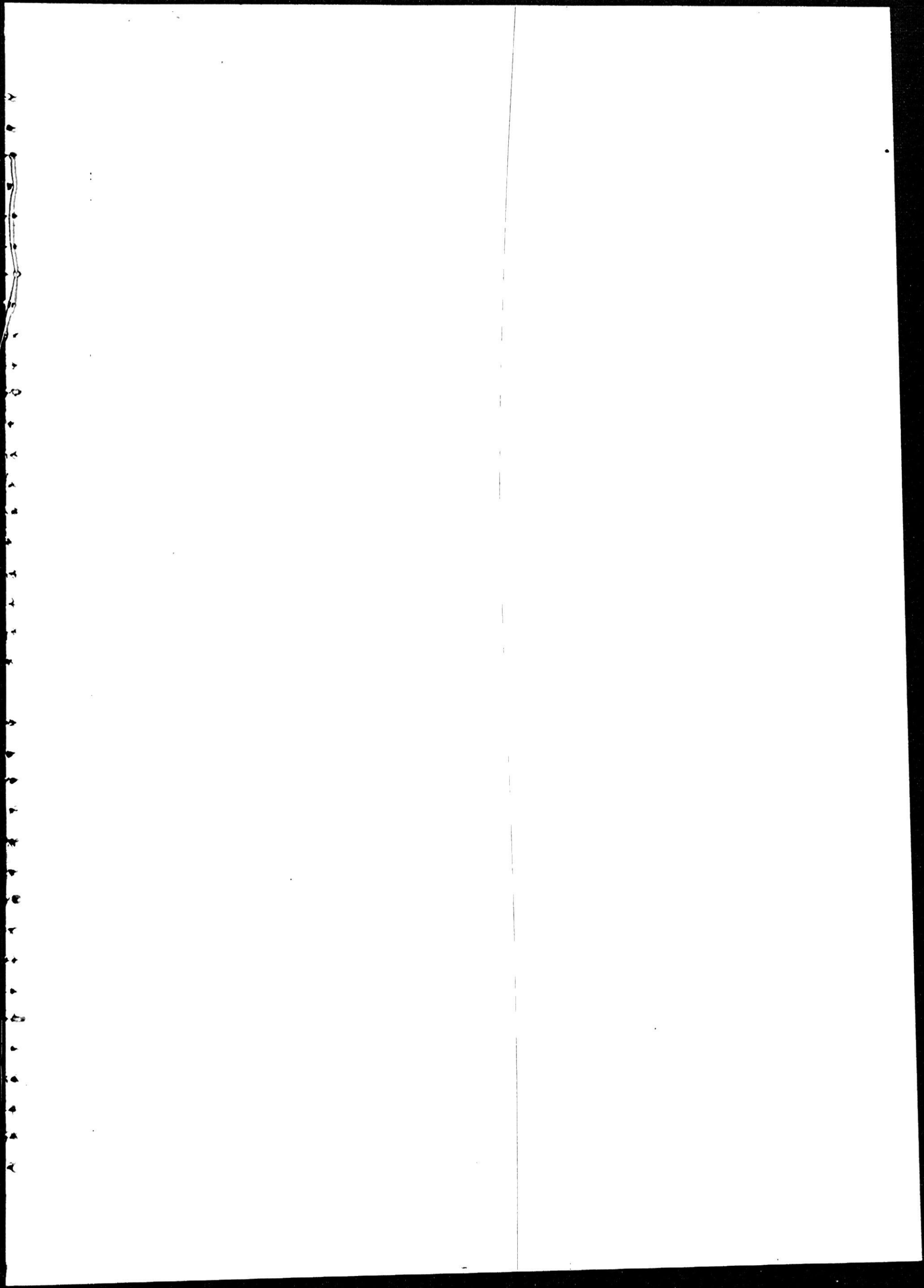
The judgment below dismissing Appellant's third count under the Salary Retention Act should be remanded for adjudication on the evidence in the record.

Respectfully submitted,

J. L. HOFFLUND

3041 Dogwood Street, N. W.
Washington 15, D. C.

Appellant, pro se.



BRIEF FOR APPELLEES

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14768

658

J. L. HOFFLUND, APPELLANT

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR, ET AL., APPELLEES

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

OLIVER GASCH,

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*United States Court of Appeals
For the
District of Columbia Circuit*

FILED JAN 5 1959

Joseph W. Stewart
CLERK

No. 14768

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Where appellant (plaintiff below), a Government attorney seeking restoration to the grade and salary held by him prior to an agency reorganization and reclassification of positions therein, does not dispute the findings of fact and conclusions of law entered in his favor by the District Court respecting the applicability of section 12 of the Veterans Preference Act (5 U.S.C. § 861), the questions presented in the opinion of appellees are as follows:

1. Does not the judgment properly and adequately conform to such findings and conclusions which were issued on the previous day?
2. Did not the trial court properly rule that adjudication of appellant's claim of rights under the Salary Retention Act (5 U.S.C. § 1107, Supp. V) must be precluded for lack of jurisdiction?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14768

J. L. HOFFLUND, APPELLANT

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR, ET AL., APPELLEES

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA**

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

This appeal involves the scope of an order granting judgment for appellant (plaintiff below), following a non-jury trial on a complaint and answer in a case involving the reduction in grade and salary of an attorney with permanent Civil Service status.

1. Background

As reflected by the exhibits of record, appellant is now serving as an attorney, in grade of GS-14, with the Department of the Interior, in the Office of the Solicitor. The present suit involves the change made in his position from that of GS-15 resulting from a reorganization of such Office and the reclassification of positions therein.

Following the conclusion of active hostilities in Korea and the curtailment of certain governmental defense activities, the

Secretary of the Interior, on February 9, 1954, ordered the reorganization of the legal staff in accordance with the recommendations of a survey team. By such reorganization, all legal activities were withdrawn from the various bureaus and branches of the Department and centralized in the Solicitor's Office. The physical relocation of legal personnel took place on May 10, 1954, but the formal transfer did not occur until July 1, 1954, when funds were appropriated by Congress for the maintenance of a single law office in that Department.

In order to expedite the reorganization, the various transfers were effected without a change of job description. Appellant was one of those so transferred. Prior to May 3, 1954, he had been serving in the Department as Chief Counsel of the Defense Minerals Exploration Administration. On that date, his title was changed to Acting Assistant Solicitor. He continued to perform the same duties, although with some modifications, until October 3, 1955, when the position was abolished and he was detailed to serve in an acting capacity as Assistant Solicitor, Branch of Mines, Division of Mineral Resources.¹

On February 1, 1956, appellant was notified that his official job description, after verification by him, had been submitted for allocation to the Branch of Personnel Operations, and that his duties and responsibilities had been allocated to Grade GS-14. This allocation, which involved a one-grade reduction, was objected to by appellant by memorandum of February 10, 1956. The Department by memorandum dated March 7, 1956 advised appellant that the grade reduction was necessary in order to promote the efficiency of the service and successfully carry out the reorganization and, further, that action had been taken to make the change effective on March 11, 1956. Pursuant to the memoranda of February 1, 1956 and March 7, 1956 the title of appellant's position was changed, effective March 11, 1956, from Supervising Attorney-Advisor to Attorney-Advisor (General) (Assistant Solicitor), his grade was lowered from GS-15 (\$12,420 per annum) to GS-14 (\$11,395 per

¹The legal work of the Defense Minerals Exploration Administration formerly performed by appellant was absorbed in the Branch of Mineral Defense Activities, the head of the Division of Mineral Resources being designated to administer such work along with his other duties.

annum), and he was formally assigned to the Office of the Solicitor, Division of Mineral Resources, Branch of Mines. The position he formerly occupied was abolished.

Appellant's appeal to the Civil Service Commission was decided adversely to him by the Appeals Examining Office (CSC documents, pp. 20-29) and by the Board of Appeals and Review, which advised him on October 29, 1956, in part as follows (CSC documents, p. 3):

"On the basis of all the facts and circumstances of your case, it has been determined that the personnel action of the Department effecting your change to lower grade was based upon the reorganization which was effected within the agency and was for such cause as will promote the efficiency of the service within the meaning of Section 14 of the Veterans' Preference Act, as amended, and that the personnel action which you are appealing was not arbitrary, unreasonable, or capricious.

"In the light of all the evidence, it has not been established that your rights as a preference eligible employee, under controlling law and Commission's regulations, have been violated."

2. District Court proceedings

In counts 1 and 2 of a three-count complaint filed on December 21, 1956, appellant sought a judgment declaring that his rights under the Veterans' Preference Act, 5 U.S.C. §§ 851-869, were violated when due to a reorganization in that Department he was demoted to his present GS-14 position and pay. In the alternative, he sought in count 3 thereof a judgment (1) declaring that under the Salary Retention Act, 5 U.S.C. § 1107, he became entitled on July 1, 1956, to the rate of basic compensation he was receiving prior to the reclassification of his position, and (2) directing appellees (defendants below) to restore his back pay. (J.A. 2-6.)

By answer filed February 19, 1957, appellees asserted that appellant's demotion was in all respects proper; also, with respect to count 3, appellees asserted that the trial court lacked jurisdiction of the subject matter thereof and that, in

any event, appellant was not entitled to relief hereunder (J.A. 6-8).

Following the denial of cross-motions for summary judgment, the case came on for trial on July 30, 1958. Apart from the exhibits attached to the foregoing motions, no additional evidence was introduced. At the conclusion of the trial proceedings, the trial judge rendered an oral opinion, expressly stated to constitute findings of facts and conclusions of law, in favor of appellant (J.A. 8-12). After stating the basis for finding Section 12 (instead of Section 14, as believed by appellees) of the Veterans' Preference Act (5 U. S. C. § 861) to be applicable, the court announced its ruling respecting the issues posed by counts 1 and 2 of the complaint as follows (J.A. 11):

"Consequently, the court is of the opinion that, under the facts of this case, the plaintiff is entitled to a veteran's preference and will render a declaratory judgment accordingly, *on the basis of which the defendants will be required to take appropriate administrative action not inconsistent with this ruling.*

"In view of the conclusion the court has reached, it becomes unnecessary to adjudicate the plaintiff's claims to such rights as he may or may not have under Section 14 of the Veterans' Preference Act, that is, Section 863 of Title 5 of the United States Code." [Italics supplied.]

The court then continued with respect to the remaining issue (J.A. 11):

"As concerns the claim under the Retention of Salary Act, different considerations prevail. It is well established that the Court of Claims has exclusive jurisdiction of actions on the part of government officers and employees for compensation for services. The Court of Appeals in the case of *Di Benedetto v. Morgenthau*, 80 Appeals D.C. 34, has held that this provision of law is equally applicable to actions for declaratory judgment to adjudicate the right of a Government officer or employee to receive certain compensation claimed by him.

"Consequently, this Court has no jurisdiction over the third count.

"Accordingly, a declaratory judgment, as indicated, will be rendered for the plaintiff on counts one and two of the complaint and count three will be dismissed for lack of jurisdiction."

In conclusion, the court ordered that a proposed form of judgment be submitted (J.A. 12).

On the following day, July 31, 1958, appellant presented to the trial court a proposed form of judgment to which appellees offered certain objections in the course of an extensive colloquy by counsel for both sides and the trial judge (J.A. 12-16). The conformity of the judgment actually issued with the substance of the prior oral opinion is indicated in part by the following portions of such colloquy (J.A. 14-15):

"Mrs. PARK. I thought your Honor held that Section 12 applied, but then, when you apply Section 12, you have to determine who should be demoted first.

The COURT. Yes.

Mrs. PARK. As this is worded, it appears to me that the agency would be foreclosed. They would have to say he is entitled to be restored to grade regardless of the rights of anybody else.

The COURT. No; that was not my intention. To review and reconsider plaintiff's demotion.

Mrs. PARK. I think it could really end, Your Honor, that defendants take appropriate administrative action consistent with this judgment. Period.

The COURT. I think that is correct.

* * * *

The COURT. But I am not going to direct the government to restore you to your original grade. All I am going to direct the Government to do is to go through the procedure required by Section 12.

Now, if under that procedure there is somebody else who is entitled to be preferred to you, that is all well and good.

* * * *

The COURT. I am not reconstructing the picture. I am directing the Government to reconstruct the picture

in accordance with the procedure required by section 12. You see, they did not follow Section 12. They said it did not apply.

I hold that it does. And, therefore, they must reconstruct the picture in accordance with that Section. That is as far as I shall go.

Mr. HOFFLUND. But, Your Honor, if it does apply, then wasn't the demotion invalid?

* * * *

The COURT. I don't know whether it was or not because it may be that it was valid. You must understand that Section 12 does not forbid all demotions. Section 12 only provides for certain preferences in case of demotions.

* * * *

The COURT. * * * In other words, I am directing them to reconstruct the picture nunc pro tunc as of March 11, 1956, following the procedure of Section 12 of the Veterans Preference Act. I am not willing to go beyond that.

* * * *

The COURT. * * * I want them to take the kind of action that they were permitted to take as of the original date under Section 12.

Mr. HOFFLUND. The law required them to take it then, not now.

The COURT. I am going to let them take it now nunc pro tunc. And if the matter is reconstituted and the downgrading is found to be wrong, then you would have a right to recover back pay.

* * * *

The proposed form of judgment submitted by appellant was thereupon altered in certain respects by the trial judge so as to reflect the actual holding. The judgment finally entered, together with the language proposed by appellant but eliminated therefrom, is a matter of record. (J.A. 16-17.)

This appeal followed.

STATUTES INVOLVED

Section 1 of the Declaratory Judgments Act of June 25, 1948, 62 Stat. 964, 28 U.S.C. Section 2201, provides in part:

"In a case of actual controversy within the jurisdiction,
* * * any court of the United States, upon the filing of
an appropriate pleading, may declare the rights and
other legal relations of any interested party seeking such
declaration * * *."

28 U.S.C. Section 1346 (1952) provides in pertinent part:

"(d) the district courts shall not have jurisdiction under
this section of:

* * * * *

(2) Any civil action or claim to recover fees, salary,
or compensation for official services of officers or em-
ployees of the United States."

SUMMARY OF ARGUMENT

The scope of the matters presented here for appellate review is narrow. Appellant, who prevailed below, does not contest the propriety or adequacy of the findings of fact and conclusions of law entered by the District Court, but contends, first, that the formal judgment actually rendered does not conform to such findings. A comparison of the judgment with the findings, however, fails to bear out appellant's contention. This is particularly evident from a further comparison of both the judgment and the findings with the intervening colloquy. Since all matters necessary to decision were properly decided, the trial court did not abuse its discretion under the Declaratory Judgments Act in declining to make further findings or to extend the language of the judgment. Appellant, in any event, will not be prejudiced by the further administrative action necessarily resulting from the District Court's judgment.

Appellant's final contention that the District Court improperly refused to adjudicate for want of jurisdiction the asserted applicability of the Salary Retention Act likewise is without merit, particularly in view of 28 U.S.C. § 1346 which expressly deprives district courts of such jurisdiction. Even

if such jurisdiction were found to exist in the trial court, appellant's claim would appear to be barred by reason of the failure to exhaust his administrative remedies. And, assuming *arguendo* that the relief sought by appellant is not afforded to his satisfaction in subsequent administrative proceedings, his legal remedy in the Court of Claims is entirely adequate so as to preclude the exercise of equitable powers by the District Court.

ARGUMENT

I

The judgment adequately conforms with the findings

No question has been presented at this posture of the case respecting the applicability of Section 12 of the Veterans Preference Act and the implementing regulations of the Civil Service Commission, a matter decided in appellant's favor by the District Court. As stated explicitly by appellant (brief, p. 4), " * * * objection is not to the findings of the trial court relating thereto, but to its judgment rendered on those findings." Since points 1 and 2 in appellant's brief are addressed to the asserted non-conformity of the judgment with the findings, the argument that follows not only assumes *arguendo* the correctness of such findings but is directed to his arguments under both points.²

Looking first at the findings of fact and conclusions of law (J.A. 8-12), the District Court ruling clearly does not extend as far as appellant apparently believes. All that the trial court found was that the administrative action should have been effected in accordance with Section 12 of the Veterans Prefer-

² Since appellees did not appeal from such judgment and findings, the incorrectness of the trial court's adverse opinion will not be asserted herein as a matter for appellate review. Nonetheless, the trial court's findings and conclusions appear to be incorrect insofar as Section 12 of the Veterans Preference Act was held applicable to the agency proceedings. (The basis for appellees' contentions therefor is noted in considerably greater detail in their several memoranda filed with the District Court.) See, in any event, the recent decision of this Court in *Steinkirchner v. Wilson*, 101 U.S. App. D.C. 92, 247 F. 2d 83 (1957), which the trial court does not appear to have applied correctly in the instant case. In the circumstances, appellees cannot be said to have been arbitrary or capricious in the administrative proceedings.

ence Act, 5 U.S.C. § 861, rather than on the basis then believed by appellees to have been proper. As respects the applicability of Section 12, the court concluded by stating that it would "render a declaratory judgment accordingly, on the basis of which the defendants [appellees] *will be required to take appropriate administrative action not inconsistent with this ruling*" (J.A. 11) (italics supplied). Nothing is contained in the opinion to show that the court's ruling was any more extensive than that specified above.

Furthermore, such portions of the opinion as specifically cited by appellant in his brief do not show any disposition by the trial court to do anything other than declare that the proper administrative procedure, *viz.*, under Section 12 of the Act, had not been followed. Significantly, the court did not purport to undertake an essentially *de novo*, administrative-type determination of appellant's rights under Section 12, and appellant has not contended otherwise. It is clear from the findings that the trial court rejected appellant's request for such a determination to be made by the court, rather than the agency.

As additionally reflected by the extensive colloquy on the following day (J.A. 12-16), the judgment finally entered conforms to the findings and conclusions. While appellant cites in his brief (pp. 12-13) certain portions of the *beginning* of such colloquy (see J.A. at pp. 12-14), he completely ignores the meaningful and highly significant remainder of the colloquy (compare J.A. 14-15). A reading of the entire colloquy, especially the portions cited in the Counterstatement, indicates the intention of the trial judge to find only that Section 12 of the Act was applicable, on the basis of which he would issue an appropriate order so that the agency could institute suitable administrative procedures not yet undertaken.

The remarks of the trial judge are no more than an elaboration of the matters encompassed in his oral opinion of the previous day and do not in any way modify or reverse the prior findings. But, even assuming *arguendo* the modification of the prior findings by such remarks, the latter should be considered as expressing the actual intention and ruling of the trial judge

inasmuch as nothing precludes him from amending the prior findings before the formal entry of judgment.

The proposed judgment submitted by appellant and objected to by appellees patently did not conform to the findings and conclusions. Such proposed judgment would have afforded relief which the trial court declined to grant and, which, furthermore, was not required in the circumstances.

Nothing forbids courts to require the *nunc pro tunc* application of appropriate administrative procedures under Section 12 at a later date. The decisions relied upon by appellant (brief, pp. 9-10) may not be construed as requiring in each and every instance the entry of a judgment of the type which he urges here. Undisputedly, instances too numerous to mention have occurred over the years when courts have remanded cases to governmental departments and agencies for further appropriate proceedings not inconsistent with the particular findings and conclusions of those courts.

This is not the case of wilful "defiance of the law and disregard of the will of Congress" which might otherwise occasion a different form of judgment. Compare *Reynolds v. Lovett*, 91 U.S. App. D.C. 276, 201 F. 2d 181, 182 (1952), *cert. denied*, 345 U.S. 926 (1953), relied upon by appellant (brief, pp. 9-10).³ Rather, the administrative action herein appears to rest on what the trial judge has observed in his uncontested findings as being "a bona fide error" on the part of the agency (J.A. 16). As further seen herein from footnote 2, p. 8, the original agency action was premised upon what, with good reason, was thought to be legal and proper at the time, but which the District Court (albeit contrary to appellees' view then and now) later considered as erroneous.

As a valid exercise of inherent equity powers and the discretion vested by the Declaratory Judgments Act in the District Court, the form of judgment entered in the instant case is proper. No convincing showing has been made that unfairness will prevail. Appellant in no way will be prejudiced by the

³ Although the District Court in the *Lovett* case thereafter issued the particular order on mandate noted by appellant (brief, p. 10), it is significant that this Court merely reversed and remanded the case (much in the manner of the trial court in the instant case) "for action in accordance with this opinion." *Id.*, 201 F. 2d at 181.

agency undertaking appropriate administrative action under Section 12 of the Veterans Preference Act which mistakenly but in obvious good faith was not effected originally.

Such action not only will adequately preserve appellant's rights, but also those of his fellow workers, some of whom might be adversely affected by the outcome of this case. These considerations were not ignored by the trial court (J.A. 14). In the circumstances, appellant has no basis for complaining that his own rights will not be preserved by appellees "now or in the future" (brief, p. 11) under the form of judgment already entered.

Since all questions necessary to decision were decided, the District Court did not abuse its discretion under the Declaratory Judgments Act in declining to make further findings or to extend the language of the judgment. See *Di Benedetto v. Morgenthau*, 80 U.S. App. D.C. 34, 148 F. 2d 223 (1945).⁴

At the end of appellant's closing argument (brief, p. 18), he belatedly and somewhat desperately attempts to interject the specter of "politics" and other factors not found in the record in the case. While conceding that his change of status occurred in a reorganization of a large legal staff, he invites the Court (brief, p. 18) to take "judicial cognizance of the fact that in 1953 the administration of our Government changed from Democratic to Republican"—a not unusual phenomenon occurring every so often under our predominantly two-party system. He claims, however, not to know the "political faith" of persons allegedly brought into the Government to "supplant" himself and others (unnamed), and notably cites no examples of undue political favoritism.

Assuming *arguendo* any merit in his observations, such arguments have no place on the instant appeal, particularly in view of the failure to present his contentions first to the Civil Service Commission, the non-partisan agency most concerned with those matters. Furthermore, in his appeal to the Com-

⁴ This would be so even if Section 10(e) of the Administrative Procedure Act of 1946 (60 Stat. 243, 5 U.S.C. § 1009(e)) were applicable here. The Act, however, does not provide for judicial review of cases of this type. See, e. g., *Hargett v. Summerfield*, 100 U.S. App. D.C. 85, 243 F. 2d 29 (1957), cert. denied, 353 U.S. 970 (1957).

mission's Board of Appeals and Review, from the decision of the Chief, Appeals Examining Office, he stated that he no longer challenged the propriety of the grade assigned to the position and that he accepted the Examiner's decision with respect thereto (CSC documents, p. 4). He further stated that he was "not contending that the reorganization of the law offices of the Department was concocted as a scheme to demote him" (CSC documents, p. 8).

The record herein establishes that the downgrading action respecting appellant resulted from the operation of the Classification Act of 1949, as amended, 5 U.S.C. §§ 1071-1153, respecting a reorganization of the Department following the curtailment of certain defense-type activities at the close of the Korean conflict.⁵ Under the Act the allocation of positions in their proper grades is the primary responsibility of each department or agency. 5 U.S.C. § 1102. Since there has been full compliance with the provisions of the Act (appellant at no time has contended otherwise), the action of the Secretary in effecting the reorganization, which relates to managerial functions, is not subject to judicial review. *Powell v. Brannon*, 91 U.S. App. D.C. 16, 196 F. 2d 871 (1952); *Adams v. Humphrey*, 98 U.S. App. D.C. 40, 232 F. 2d 40 (1955); *Boylan v. Quarles*, 98 U.S. App. D.C. 337, 235 F. 2d 834 (1956).

II

Appellant's premature assertion of rights under the Salary Retention Act was properly dismissed

Count 3 of the complaint, which asserts a claim of right under the Salary Retention Act,⁶ was properly ordered "dismissed

⁵ The reorganization was carried out in accordance with the recommendations of a survey team and was based upon managerial considerations. The record shows that appellant was not wrongfully downgraded or supplanted by anyone. Insofar as appellant claims entitlement to a so-called "super-grade" position (above Grade GS-15), no employee is entitled to a promotion (regardless of the type of position concerned) as a matter of right. *Cutting v. Higley*, 98 U.S. App. D.C. 288, 235 F. 2d 515 (1956), *cert. denied*, 352 U.S. 883 (1956); *Wagner v. Higley*, 98 U. S. App. D.C. 291, 235 F. 2d 518 (1956).

⁶ 70 Stat. 291, 5 U.S.C. § 1107 (Supp. V, 1956). Appellant does not rely on the amendment of the Act by P.L. 85-737, 85th Cong. (August 23, 1958), 72 Stat. 830.

without prejudice for lack of jurisdiction" by the District Court (J.A. 17). Indisputably the judgment to this effect conforms to the applicable findings (J.A. 11), as quoted in part in the foregoing Counterstatement.

Both the findings and judgment of the trial court respecting a lack of jurisdiction to adjudicate matters falling within the purview of the Salary Retention Act are manifestly correct. Although conceding (brief, p. 16) that a judgment for appellant under count 3 "would not have been a judgment for money, and could not have been enforced as such," he claims essentially a legal right to recover salary for past official services as a government employee. But it is clear that the District Court lacks jurisdiction to adjudicate such a claim by reason of 28 U.S.C. § 1346(d)(2), quoted *supra*. Accordingly, the District Court may not direct appellees to restore appellant's back pay or to declare that he is entitled to such pay, for the Declaratory Judgment Act does not confer jurisdiction where none exists. *Di Benedetto v. Morgenthau, supra*; *Almour v. Pace*, 90 U.S. App. D.C. 63, 193 F. 2d 699 (1951); *Cadillac Publishing Company v. Summerfield*, 97 U.S. App. D.C. 14, 227 F. 2d 29 (1955), *cert. denied*, 350 U.S. 901 (1955).

Assuming *arguendo* that such jurisdiction is found to reside in the District Court, the manifest adequacy of the legal remedy precludes the exercise of equitable powers. Even if appellant should later institute and prevail in a suit for back pay in the Court of Claims, it would be unfair to assume that thereafter the Secretary of the Interior, as a responsible cabinet officer, would withhold without legal right and in utter bad faith such monies as may later become due and owing to appellant. Since there is nothing in the present record from which to anticipate such a course of conduct by the Secretary, appellant's fears are based on wholly unfounded and unwarranted speculation which does not merit intervention by the District Court.

The District Court, nonetheless, may not at this time afford the relief appellant seeks in counts 3, even if appropriate jurisdiction were found to exist, for appellant has failed to show that he has taken advantage of the administrative remedy available to him. The Civil Service Commission has afforded

an adequate appellate procedure to be used where there has been an administrative determination that a person is not entitled to salary retention benefits. 22 F.R. 1099. Appellant's failure to exhaust such administrative remedy bars him from relief with respect to count 3. *Young v. Higley*, 95 U.S. App. D.C. 122, 220 F.2d 487 (1955).

The prior exhaustion of administrative remedies is all the more required here in view of the existence of a question of fact as to whether or not appellant held the same position for a continuous period of not less than two years ending June 18, 1956, as required as a condition for relief under the Salary Retention Act, 5 U.S.C. 1107(b).⁷ Such matters are more properly determinable at the agency level in the first instance. The Court, in any event, should not intervene until the administrative proceedings have been concluded. This seems particularly desirable here, for such issue would become moot if appellant were restored to the grade and pay of GS-15 upon the outcome of the administrative proceedings yet to be held in accordance with Section 12 of the Veterans Preference Act.

Since the dismissal of count 3 was ordered to be "without prejudice," appellant is not barred from obtaining judicial consideration of his contentions should he hereafter receive an adverse determination in the above-noted appellate procedure of the Commission. Further judicial action, however, may become unnecessary if appellant's position should be determined as that of GS-15 in the administrative procedure to be afforded him under Section 12 of the Veterans Preference Act. It would be entirely unrealistic to assume—as apparently he does (brief, p. 17)—that his salary would not be increased correspondingly with the restored grade.

⁷ The administrative record which has been made a part of the record on appeal reflects such a "material change in duties or responsibilities" of appellant during such two-year period as to preclude the applicability of relief under the Act. See 5 C.F.R. § 25, 403 (c) (1956 Supp.) which are the regulations of the Civil Service Commission issued pursuant to and in implementation of the Act. The point is not further briefed, although it was extensively argued below, in view of the findings and judgment of the trial court hereinbefore noted.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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